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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C. 20590

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In the Matter of

AMERICAN SOCIETY OF TRAVEL AGENTS, INC.
and
JOSEPH L. GALLOWAY
Complainants
v.

UNITED AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIRLINES, INC., NORTHWEST AIRLINES, INC., CONTINENTAL AIRLINES, INC., US AIRWAYS, INC., TRANS WORLD AIRLINES, INC., AMERICA WEST AIRLINES, INC., ALASKA AIRLINES, INC., AMERICAN TRANS AIR, HORIZON AIR INDUSTRIES, INC., MIDWEST EXPRESS, INC., AIR CANADA, KLM ROYAL DUTCH AIRLINES, TACA INTERNATIONAL AIRLINES, INC. and AIR FRANCE
Respondents

Docket OST-99-6410-1

COMPLAINT
of the
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.
and
JOSEPH L. GALLOWAY

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October 25, 1999

BEFORE THE
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WASHINGTON, D.C. 20590

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and	:
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COMPLAINT
of the
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.
and
JOSEPH L. GALLOWAY

The American Society of Travel Agents, Inc. ("ASTA"), and Joseph L. Galloway, its President and Chief Executive Officer, herewith complain against United Airlines, Inc., American Airlines, Inc., Delta Airlines, Inc., Northwest Airlines, Inc., Continental Airlines, Inc., US Airways, Inc., Trans World Airlines, Inc., America West Airlines, Inc., Alaska Airlines, Inc., American Trans Air, Horizon, Airlines, Inc. Midwest Express, Inc. , Air Canada, KLM Royal

Dutch Airlines, TACA International Airlines, Inc. and Air France (the "Respondents") for unfair practices and unfair methods of competition in air transportation and the sale of air transportation, in violation of 49 USC 41712, and request the Secretary of Transportation to order the Respondents to stop such unlawful practices and methods of competition.

Complainants

ASTA was established in 193 1 and is today the leading professional travel trade organization in the world. Its travel agency members account for more than half of the 29,000 staffed travel agency locations serving the public throughout the United States. ASTA's corporate purposes specifically include promoting and representing the views and interests of travel agents to all levels of government and industry, promoting professional and ethical conduct in the travel agency industry worldwide, and promoting consumer protection for the traveling public.

ASTA has provided testimony to numerous legislative committees and fact finding bodies and has appeared in various legal proceedings; it is widely recognized as responsibly representing the interests of its members and the travel agency industry.' All of ASTA's travel agency members are "ticket agents" within the meaning of 49 USC 40102(a)(40). ASTA is filing this complaint in its representative capacity on behalf of those ticket agent members.

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[1] See e.g. Investigation into the Competitive Marketing of Air Transnortation, C.A.B. Docket 36595, aff'd; Republic Airlines, Inc. v. C.A.B., 756 F.2d 1304 (8th Cir. 1985); In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 61 USLW 2610, 1993-1 Trade Cas.(CCH) ¶70,165 (N.D. Ga., 1993); U.S. v. Airline Tariff Publishing Co., 1993-1 Trade Cas. (CCH) ¶70,191 (D. DC., 1993); Spiro v. Delmar Travel Bureau, Inc., 591 N.Y.S.2d 237 (A.D. 3 Dept. 1992); and Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996).

In addition to serving as ASTA's President and Chief Executive Officer, Mr. Galloway is a travel agent, owner of Trans-Continental Travel, located at 5959 Westheimer, Houston, Texas 77057, and a "ticket agent," within the meaning of 49 USC 40102(a)(40).

Respondents

Each of the named Respondents is a certificated United States "air carrier" or a "foreign air carrier" within the meaning of 49 USC 40102(a)(2) and 49 USC 40102(a)(21).

Statutory Framework

The initial framework for federal regulation of civil aviation was set forth in the Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 (1938). Section 411 of that Act, which gave the original Civil Aeronautics Authority the power to determine if any carrier engaged in unfair or deceptive practices or unfair methods of competition, was the predecessor of present section 417 12. The unfair practices provision has not been substantively changed in the 6 1 succeeding years during which the statute has otherwise been significantly rewritten by Congress.

The most fundamental changes have been entirely in keeping with the intent of section 41712. Congress enacted the Airline Deregulation Act in 1978. Pub.L. No. 95-504, 92 Stat. 1705 (1978) (Deregulation Act) to encourage and develop an air transportation system that "relies on competitive market forces to determine the quality, variety, and price of air services."

The Deregulation Act directed the CAB, and later the Department of Transportation, to consider a number of factors to be in the public interest, including "[t]he prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation." Id. at 1706. In 1980, Congress amended section 102 of the Act by adding a more comprehensive treatment of matters to be considered in the public interest. This treatment contains a new emphasis on "maximum reliance on competitive market forces and on actual and potential competition" to achieve the goals of safe, efficient and economic air transportation. Pub.L. No. 96-192, 94 Stat. 35 (1980).

Finally, Congress enacted the Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703 (1984), which terminated or transferred the remaining functions of the CAB and provided for its demise. The Sunset Act transferred the responsibility for enforcing section 411 to the Department of Transportation. Id. at 1704.[2]

The legislative history makes clear the fundamental and continuing purpose of section 411 (now 417 12) to protect consumers from air carrier practices. The House Committee on Public Works and Transportation specifically noted that there was a need to clarify the status of some of the CAB's authority after sunset because the sunset provisions of the 1978 Deregulation Act did not deal with the authority to protect consumers and to prevent unfair competitive practices.[3] The Committee concluded that this important authority should be continued and should be exercised by the Department of Transportation.[4]

> The Committee has determined that the Department of Transportation is the most appropriate agency to administer CAB's consumer protection and unfair competitive practice authorities. Under the ADA, DOT will get CAB's authority to protect consumers and competitors.. . .[5]

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[2] Code revisions in 1994 recodified the section as 49 U.S.C. 41712. Section 12 of the Sunset Act continued in effect all rules, regulations, orders and determinations of the CAB and gave the same authority as held by the CAB to any agency to which CAB functions were transferred.

[3] H.R.Rep. No. 793, 98th Cong., 2d Sess. 1, 3 (1984), reprinted in 1984. U.S. Code Cong. & Admin. News 2857, 2859.

[4] H.R.Rep. No. 793 at 4-6; 1984 U.S. CODE Cong. & Admin. News at 2860.

[5] H.R.Rep. No. 793 at 6; 1984 U.S. CODE Cong. & Admin. News at 2 862.

Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990).

Section 411 was patterned after section 5 of the Federal Trade Commission Act. Derived, as they are from that statute, the words "unfair * * * practices" and "unfair methods of competition" as used in section 411 contain a broader concept than the common-law idea of unfair competition. Pan American World Airwavs, Inc. v. U.S., 371 U.S. 296 (1963).

The scope of "unfair practices" and "unfair methods of competition" was left for case-by- case definition. The Senate Report stated:

> It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition!

In Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, the Supreme Court concluded that "unfair competition was that practice which destroys competition and establishes monopoly." The provision was designed to supplement the Sherman Act by stopping "in their incipiency those methods of competition which fall within the meaning of the word 'unfair". . . . (emphasis added).

Whatever the unfair practice or unfair method employed, section 411, like section 5 of the Federal Trade Commission Act, was designed to bolster and strengthen anti-trust enforcement. Pan American World Airways, Inc. v. U.S., *supra* at 307.

[6] S. Rep. No. 597, 63d Cong., 2d Sess., p. 13, quoted at 371 U.S. 306.

The Court in Pan American World Airways, Inc. v. U.S., *supra*, further observed:

> "[U]nfair practices" and "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly.
>
> These words, transferred to the Civil Aeronautics Act, gather meaning from the context of that particular regulatory measure and the type of competitive regime which it visualizes. That regime has its special standard of the "public interest" as defined by Congress.
>
> The standards to be applied by the Board in enforcing the Act are broadly stated in section 2: 'In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity-....
>
> '(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . . . .
> ....
>
> "The 'present and future needs' of our foreign and domestic commerce, regulations that foster 'sound economic conditions,' the promotion of service free of 'unfair or destructive competitive practices,' regulations that produce the proper degree of 'competition'--each of these is pertinent to the problems arising under section 411."

371 U.S. 307-309, citations omitted.]

The scope of 49 U.S.C. 41712 is thus much broader than common law notions and even principles laid down in the antitrust laws. The Secretary can forbid anticompetitive practices even before they become serious enough to violate the Sherman Act. United Airlines v. Civil Aeronautics Board, 766 F.2d 1107 (CA7, 1985), at 1114. As the court there noted, a finding of substantial market power would bring the carriers' practices, even without any evidence of collusion, within Section 411. United Airlines v. Civil Aeronautics Board, *supra* at 1114.

Moreover, acts undertaken by any one of them, with predatory intent, for the purpose of eliminating travel agents as viable competitors are clearly within the sweep of 49 U.S.C. 417 12. Aloha Airlines, Inc. v. Hawaiian Airlines. Inc., 349 F..Supp. 1064 (USDC HI 1972).

Economic Background: Travel Agents & Competition

Travel agents serve at least three crucial functions essential to assuring the competitive environment necessary for the public to benefit from, rather than be victimized by, airline deregulation.

First, they facilitate entry, exit and price and service competition among existing and new entrant airlines. Agents provide every carrier, in every market, an instant professional distribution system ready and able to inform the public of service and price options and to sell all of the inventory available at any moment, with no additional investment required by the airlines.

Second, travel agents serve as the only one-stop, neutral source of comprehensive information and counseling about an incredibly complex, constantly changing array of fares and services that confronts the general public.

Third, they promote the use of air transportation services, providing the expanding universe of customers necessary to support a healthy air transportation system, but of special importance to new and potential entrants.

Travel agents quote schedules and fares, and provide ticketing services, to consumers on major U.S. airlines, small U.S. airlines, large and small international airlines, and start-up airlines. Travel agents are the only efficient, independent and comprehensive neutral sources of information for airline travel options. Travel agency sales of air travel alone exceed $80 billion annually.

The vast majority of travel agencies are independently-owned, small businesses, which, in addition to their other roles, compete with airlines and other travel suppliers engaged in direct selling. Since deregulation of the U.S. airline industry in the late 1970s, the public has had the choice of buying directly from suppliers such as airlines at no additional cost and overwhelmingly has chosen to deal with travel agencies.

The vast majority of consumers prefer dealing with travel agencies rather than airlines when purchasing air transportation because agencies deliver far more value, convenience and services. Among these services is collecting and distributing comparative information and advice about the price and quality of airline offerings, a function that no single airline can or wants to perform. In addition, compared to direct-dealing with airlines, consumers' transaction costs are often lower through travel agencies, especially when many travel arrangements are joint purchases of the products of several travel suppliers, air transportation and hotel/rental car, for example.

During the early years of deregulation these functions of the professional full-service travel agency served the needs of the airlines very well. Once the airlines' ability to fix commissions by agreement was ended by the Civil Aeronautics Board, competitive forces led to the expected and inevitable rise in agency compensation to the level of 10 percent of the fare sold as a "base commission" for all transactions.

Travel agencies made rapid competitive maneuvering possible in an environment where the race went to the swiftest. As the airlines adapted to the new competitive marketplace, they earned considerable profits during the 1980's. Deregulation thus produced benefits for the major airlines as well as the traveling public.

Travel agencies also benefitted. The public liked what travel agencies did for them, and they flocked to agencies for help with the morass of fares and schedule changes that deregulation produced as the necessary corollary to a free market. The market share of travel agencies for air transportation rose from a pre-deregulation level in the low 40 percent range to about 80 percent for domestic sales and over 90 percent for international business.

Travel agencies continued to do well even when the fortunes of the airlines turned down in the early 1990's.[7] The airlines lost billions a year while agency sales continued to rise, save only for the Gulf War year of 199 1.

More recently, with the consolidation of the industry into a handful of giant carriers, and with various other types of alliances being almost routinely approved by the Department of Transportation,[8] these large airlines began to conclude that travel agents were an obstacle to their objectives. Agents made sure that consumers fully understood all of the fare and service options open to them. The airlines came to understand that consolidation of the airline industry, combined with the success of passenger loyalty programs, had given them genuine market power over travel agencies. And, for the first time, an apparent alternative to distribution through travel agencies had emerged: the Internet, by which the airlines believed they could control directly the information provided to the public without meddlesome interference by travel agents telling a somewhat different, and unbiased, story.

Non-compensatory Commission Policies

Armed with motive and opportunity, the airlines are now embarked on a campaign to eliminate or at the least severely impair the public's access to travel agents. That course of

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[7] The agencies' share of airline sales rose from 55 percent in 1977 to 81 percent in 1995. P. Ruden, Competition in the Distribution of Travel Services 5 (ASTA 1997).

[8] Some of these alliances have received antitrust immunity permitting airlines that would otherwise be competitors to freely collude with respect to routes, rates, services and commissions.

conduct has substantially reduced, and now threatens to eliminate, competition in the market for travel services and to injure consumer welfare.

The first action in the airlines' campaign began in 1995, when the major airlines, with the exception of Southwest Airlines, capped travel agency domestic commissions at $50 per round-trip ticket. This was followed in September 1997, with across-the-board reductions in the domestic base commission rate from 10 percent to 8 percent, retaining the caps on maximum commissions that could be earned. In 1998, international fares were subjected to caps. In dollar terms, the total compensation reduction to agents from these actions was more than 30%.[9] This "revenue squeeze" had already made entire segments of airline ticketing activity non-remunerative for agents. In turn, it has been a major factor in the exit of 12 percent of independent U.S. travel agencies from the industry during 1995-98, as well as in a shifting of resources by many of the remaining agencies to non-air sales.

Finally, on Thursday, October 7, 1999, United Airlines announced a further reduction in its base domestic commission level from eight percent to five percent, continuing the caps previously established. It was followed in that action by American Airlines on October 8, and Delta Airlines on October 11. Northwest, Continental and Air France were quick to fall in line.

The Cost Squeeze

The revenue squeeze described above is only part of the story. The respondents are also parties to other actions, some taken individually and others taken collectively through the Airlines Reporting Corporation and/or the International Air Transport Association, that are intended to and

[9] The commission rate for January, 1999, domestic air transactions was 6.71 percent according to official Airlines Reporting Corporation reports. In January, 1995, before the commission caps, the rate was 10.01 percent.

have the effect of raising travel agent costs and impairing travel agency efficiency. These same practices are intended to and, if allowed to continue, will have the effect of impairing consumer access to travel agencies and travel agencies' access to consumers.

The practices referred to consist at least of the following:

1. *Imposition of unnecessary and unwanted training requirements.*

The Airlines Reporting Corporation (ARC), as of July 1, 1999, requires passage of a Certified ARC Specialist examination for all new agency locations and in all cases of change of ownership of 30 percent or more of voting shares, regardless of prior experience in the industry. ARC is now floating the idea of a CAS II which would replace the personnel standards for the agency manager qualifier. Currently the manager qualifier must on have two years experience in a company selling general travel services to the public. ARC's is proposing that a separate CAS test, focused on management related questions, be developed as "an option" to the current standards.

The cost of CAS training ranges from $295 for the Internet-based version to $495 for a video. The test fee itself ranges from $95 to $125. With travel costs and lost productive time considered, the total cost of being CAS tested may easily exceed $1,000 per applicant.

The ticketing qualifier can be the owner/manager, but it can also be anyone in the office. Since the CAS accreditation is bestowed on the individual, but required of the agency entity, whenever the CAS qualifier leaves the agency, the agency is again forced to endure the costs and hassles of either recruiting a CAS qualified agent or training and testing yet another employee (another financial burden). Once the CAS qualifier leaves the agency, he is required by ARC to notify ARC withing 45 days. The agency also must notify ARC within 45 day of any changes in the employment of the CAS qualifier.

The Agent Reporting Agreement (ARA) does not provide a CAS agency any protection or grace period once the registered CAS qualifier leaves. Therefore, once the CAS leaves, the agency is in immediate breach of the ARA.

2. Unnecessary Ticket Security Requirements.

Last year ARC imposed a new rule forcing many travel agents to acquire a locking safe for accountable documents at a cost of up to $1,000. This occurred at a time when travel agent use of paper ticket stock has declined dramatically. As of August, 1999, over 43 percent of all travel agent air transactions involved electronic tickets (essentially the issuance of a receipt, the loss of which creates no liability for the airline or the agent).

3. Discrimination Against Travel Agents on the Internet.

ARC now administers the airlines' Electronic Reservations Service Provider Identification Number program (ERSP). Some airlines require agents to obtain ERSP numbers, in addition to their ARC numbers, if they offer consumers access to their inventory via the Internet. The sole discernable purpose of the these numbers is to enforce policies that cap commissions on Internet-originating transactions at $10. The cost to the agent to get the ERSP number is $225, with an annual renewal fee of $150.

4. Resistance to Efficient GDS Displays on Code Shared Flights.

The airlines have resisted agent requested changes to the code-share regulations to prevent the clogging of screen displays with multiple listings of what are in truth a single flight. ASTA requested that this practice be stopped several years ago. The airlines resisted and DOT, in its latest code-share action, which imposed additional disclosure obligations on travel agents, said that the issue of multiple displays was under consideration in another rule-making and would be considered there.[10]

5. *Passive Segments*

Many airlines today pay no comrnissions for tickets issued using passive segments and even charge back to the travel agent the fees assessed by GDS's, owned wholly or partly by airlines, for such segments. Some of the GDS's, owned wholly or partly by the airlines, have stopped offering productivity credit for unticketed passive segments, making it even more difficult for travel agents to achieve the productivity quotas the GDS's require in their contracts with agent subscribers.

6. *Interference with Travel Agent Achievement of GDS Productivity Quotas.*

GDS subscriber contracts with travel agencies usually contain segment booking thresholds. The failure to achieve these levels of segment bookings results in serious economic penalties. Airline owned GDS's have enforced these penalties rigorously while the airline owners of those same GDS's continue reducing agent income and income-producing opportunities and thereby impair agents' ability to meet the contractual thresholds while the penalties continue to be collected.

7. *Refusal to Provide Settlement Efficiencies for Travel Agent Service Fees.*

When Delta Airlines declared open season on travel agents in February, 1995 with the first commission caps, it made a prescient statement. Delta said it expected that travel agents would make up part of the loss in commissions by charging their clients for the services they provide. In fact, travel agents have begun to do just that, reluctantly but unavoidably. The fee average

[10] Final Rule in Dockets OST-95-179 & OST-95-623, 64 Fed. Reg. 12844.

recently has been about $10 per transaction, a very small amount relative to the price of the average ticket.

Many travel agents would prefer to settle these fees with all of the efficiency benefits of the ARC Area Settlement Plan. The most efficient way to do this is to have a place on the ticket stock into which the agent's fee can be inserted, permitting the data recordation process at the ARC-ASP settlement banks to extract the fee data at the same time and in the same manner as the other ticket data is recorded and accounted for.

ASTA's efforts to get such a box on the ticket stock were rebuffed. One airline informed us that there was no point to going through a long process to find and plan space on the ticket because the carrier would never agree to permit such a box. Since IATA decision rules require unanimity and since IATA would have to concur in changes to the ticket stock, travel agents were denied this efficiency tool even as the airlines escalated their disintermediation campaign through a series of three additional commission reductions in 1997, 1998 and 1999.

8. Discriminatory Ticketing Policies.

Major airlines refuse to permit agents to offer certain benefits and concessions to consumers, such as the refund of so-called "non-refundable" tickets, while reserving to themselves the right to make such refunds. Transgressions are punished severely with airlines levying cash penalties against agents to which agents are summarily required to acquiesce or face the greater penalty of losing their ability to issue tickets altogether. Yet the airlines themselves often issue such refunds. The airlines then typically force the agent to repay the commission earned on the original sale.

Similar discrimination in competitive practices occurs with respect to price-saving ticket-combination opportunities, such as the sale of "back-to-back"[11] and "hidden city"[12] tickets which are prohibited to travel agents, with severe penalties when detected, but are routinely issued by the airlines themselves. Some airlines now also provide fares that are available only by dealing directly with them through their Internet sites. These special fares are often accompanied by other inducements, such as bonus frequent-flyer miles, to lure consumers to buy direct, while the airlines imposed non-compensatory commission caps on agent sales of Internet-originated transactions. These discriminations have the consequence of interfering with the relationship between the travel agency and its clients, by, among other things, impairing the agency's credibility in the eyes of the customer.

In addition, major airlines, while acknowledging passenger contracts for passage legally exist only between passengers and airlines, nonetheless reserve the right to penalize travel agents financially when consumers buy inexpensive round-trip tickets, travel one-way, and throw away the return portion of the ticket. Such policies confuse and anger the public, while undermining the relationship between the travel agent and his client, who expects the agent to find and ticket the lowest fare available.

Airlines have also adopted an identical condition upon redemption of frequent flyer awards that arbitrarily forces consumers to by-pass agencies. These awards are mostly earned at

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[11] "Back-to-back" tickets, are a pair of tickets issued to permit the traveler to avoid the Saturday night layover normally required to get a discounted ticket. Airlines prohibit agents from issuing these tickets, and normally demand the agent pay the full coach fare as the penalty for so doing.

[12] "Hidden city" tickets are transactions in which the passenger buys a ticket A-B-C, which is cheaper than a non-stop A-B ticket, then gets off the plane at B.

employer expense but are commonly used by individual travelers for leisure trips, many of which would have been arranged through travel agencies. The airlines divert substantial revenue from agencies by requiring awards to be redeemed directly from airlines.

In perhaps the most bizarre of these practices, and the one known instance in which the airlines did not essentially copy each other's policies, Delta Air Lines, in early 1999, announced a $1 surcharge for each published fare component on all U.S. domestic fares. As a result, most round-trip tickets, which are constructed using two fare components, would include a $2 surcharge. Additional surcharges would apply on tickets constructed using multiple fare components. This surcharge, however, would not be applied to tickets issued via Delta's SkyLinks Internet web site.

Delta sought to penalize all of its customers who wished to avail themselves of the opportunity to receive comparative information by consulting a travel agent. The avoidance of the $1 surcharge penalty by using the Delta web site was another form of "fools gold" placed in consumers' paths to lure them into remaining in the dark about fare alternatives that could potentially save them hundreds of dollars.

Delta cited increased computer reservation system booking fees as its justification for this punitive charge for using a travel agent. Since the airlines by and large own the CRS systems, they are both responsible for, and benefit directly from, the increased CRS booking fees of which Delta purported to complain. Fortunately, this particular piece of airline heavy-handedness was too much for the other carriers and the plan met a swift and well-deserved death.

9. Jointly Sponsored Competition Against Travel Agents.

Until late 1998, the airlines operated SATO, Inc., the functional equivalent of a mega-sized travel agency used to compete with travel agencies for government and corporate business.[13] The airlines claimed that SATO was more cost-effective than travel agencies and that it was operated on a non-profit, strict cost-pass-through basis, but there is evidence that the actual cost of SATO on a percentage-of-ticket-price basis is several points higher than the average actual cost of travel agency commissions. And when the airlines capped travel agent commissions in 1995, no reduction was placed on SATO's working "commission," thus increasing the advantages it had over regular travel agencies.

In fact, exempt from the same commission caps and ticketing restrictions that the carriers had imposed upon travel agencies, SATO enjoyed an effective commission rate of approximately eleven (11) percent, or about twice as much as agencies' average gross cornmissions on air sales.

10. *Misuse of Confidential Travel Agent Information.*

One of the most egregious of the airline practices in question, is the process whereby the airlines share competitively significant sales transaction data in violation of the confidentiality interests of the travel agents and other independent air travel distributors who generated the transactions. Confidential business information generated by travel agencies is routinely captured and shared by the airlines in a manner that would be blatantly unlawful absent regulations issued by the Department of Transportation. Those regulations require each computer reservations system (most of which are controlled by airlines) to make available to all participating U.S. airlines all marketing, booking and sales data that it generates from its systems.

In addition, ARC sells to airlines travel agency "total sales" figures, information that would normally be confidential unless a business consented to its disclosure. Because airlines are

[13] SATO, Inc. was sold to private investors who operate it as a travel agency.

major competitors of travel agencies, they should not have access to proprietary data of this kind without the consent of the agency that generated it.

Discussion

No less an authority than Dr. Alfred Kahn, the acknowledged "father" of airline deregulation, has observed, that deregulation can continue "only in the presence of effective competition as the protector of consumers." Both economic theory and practice within the air transportation industry support the conclusion that the availability of comparative information about air transportation services is essential to vigorous competition among the airlines and necessary to the maintenance of affordable fares and responsive services throughout the country. Since 1978, the stated policy of the United States, as manifested in the Federal Aviation Act of 1958, amended by the Airline Deregulation Act of 1978, has been to promote aggressively conditions of competition between and among the airlines.

Consumers must have access to travel agents who provide unbiased consolidated schedule and fare information if we are to preserve competition in the airline industry and maintain a system that provides the public with a broad range of options, including access to small airlines and start-up carriers. As airlines continue to reduce agency commissions, many agencies will be forced out of business. Those that survive will inevitably be forced to charge higher service fees, placing travel agent services beyond the means of millions of consumers who need them most, but who will be forced to deal directly with major airlines.

This puts the consumer right where the airlines want him, bereft of a neutral source of comparative information and expertise to deal with a bewildering array of complex air fares and services. As travel agents are forced out and airlines secure more direct consumer business, consumer alternatives will continue to decrease resulting in significantly higher consumer travel costs.

The carriers' anti-competitive strategy is likely designed to, and surely will, have the effect of, eroding the ability and incentives of consumers to seek and obtain the services of travel agencies, including emergent on-line booking services and auction sites. The airlines know and are acting upon the fundamental truth that when consumers are deprived of comparative information in making travel purchases, they almost always end up paying more — not because fares rise in absolute terms but rather because consumers are unaware of lower fares and are therefore not able to claim them.

Moreover, market imperfections, including consumers' notorious lack of information about carriers' complex, ever-changing and often poorly visible price and service offerings, enable carriers with market power over particular routes and facilities to discriminate against captive consumers. By limiting access to travel agencies, individual airlines can and do exercise and maintain market power in discrete geographic markets for air transportation, especially city-pairs involving a "hub" where the carrier is the dominant or monopoly provider.

Simply put, carrier practices that even modestly reduce competition from travel agencies produce immediate and out-sized gains in carrier profitability, not because of increased efficiency but by exploitation of consumers' inability to obtain the lowest price when dealing directly with them.

If the airlines can divert any meaningful amount of this business to themselves, through elimination of public access to travel agencies, the potential gain to them is enormous, not merely in commissions avoided, but in the higher overall prices that consumers will pay for air travel. Deprived of easy access to independent sources of comparative price and service information, consumers inevitably will end up paying more, on average, even if the airlines never raised another fare.

By lock-step imposition of commission caps paid to on-line travel agencies and other independent on-line ticketing services at a rate of 5 percent, with a cap of $10, which is well below these firms' costs, the airlines have already succeeded in arresting in its incipiency an effective counter-measure available to agencies to offset reductions in commissions on traditional sales: unfettered access to consumers through high-volume, low-cost Internet marketing systems.

Small domestic airlines, many international airlines, and start- up airlines who depend upon the travel agency distribution system will be adversely impacted if not eliminated. There is no alternate distribution system available to these types of airlines. Indeed, for at least the second time since airlines were deregulated, the so-called "new entrant" airline group, which typically operates on a no-frills, low-cost, and thus low fare, economic model, is finding it difficult, if not impossible to compete with major established airlines.

A competitive market for travel services, i.e., one in which consumers anywhere in the U.S. can readily turn to independent travel agents to reduce search costs and avoid buying errors, makes it possible for these new carriers to enter the market and for small carriers to expand without bearing the full costs of second-stage entry (developing their own distribution network). Thus, carrier practices that restrain the ability of agents to compete also tend to raise entry barriers in first-stage markets in which carriers compete among themselves. The Congress, as well as Federal agencies such as DOJ and DOT have long been concerned about market conditions that impede entry and expansion of small, low-price carriers, and there is good reason to believe that elimination of travel agency competition will translate directly into less competition in the market for air transportation.

Thus, travel agencies provide a crucial competitive check upon an individual carrier's ability to exploit consumers' lack of information to obtain ticket prices that are effectively higher than competitive prices. This problem is especially acute in local hub markets, where major U.S. carriers can and do extract fares substantially higher — upwards of 40 percent — than fares for comparable service at non-hub markets. It is therefore not surprising that these same dominant carriers are the ones that have been the most active in imposing restraints on travel agencies' ability and incentives to protect consumers.

If the major airlines are successful in destroying most or all of the smaller, new entrant airlines, competition in airline pricing and schedules will diminish even further.

Moreover, major airlines have generally misrepresented the reason for agency commission cuts, citing a need to reduce expenses and pass savings on to consumers. In fact, airline ticket prices have steadily increased, and airlines have been posting record profits quarter-after-quarter. Not one penny of the alleged cost savings can be discerned to have been passed on to consumers through better service or lower ticket prices. There have been no consumer benefits, and consumers are paying the highest airfares in history.

Conclusion

It would be profoundly wrong to assume that the net economic effects of a decrease in travel agent commissions, driving significant numbers of them from the marketplace would be either neutral or benign. The reduction in travel agency commissions below compensatory levels, driving agencies out of business, threatens permanent injury not just to the agencies, but to the competitive process itself. It will erect, for all times, an unscalably high entry barrier to new carrier competition. By increasing consumer costs as discussed above, it will result in the transfer to the major carriers of vast amounts of wealth that consumers would otherwise enjoy.

If successfully consummated by the major carriers, this strategy will make it much harder for the public to learn about all of the fare and service options available to them and thus increase the likelihood that they will, on the whole, spend more for air travel than they otherwise would. By restricting access to unbiased and comprehensive information from independent sources, the airlines expect, rightfully, that they will be able to increase the average price consumers pay for air travel.

If, indeed, as many industry observers have concluded, it costs a carrier more to handle sales internally than through the travel agency system, the reduction in travel agent commissions, driving agents out of business, is much more than a poor business judgment that the marketplace alone would eventually correct— the strategy would reflect a naked exclusionary intent, not just to eliminate agents but also preclude competition from new entrants.

Under these circumstances, the case for intervention by the Secretary under 49 USC 41712 is compelling and in the public interest. After the damage has been done, to agencies, to would-be new entrants, to the public, it cannot readily be undone.

As informed by the Supreme Court's discussion of its predecessor, Section 411 of the Federal Aviation Act, in Pan American World Airwavs, Inc. v. U.S., 371 U.S. 476 (1963), Section 4 17 12's concept of unfair methods of competition in air transportation includes within it "destructive competitive practices." The Secretary here has the opportunity to act in the public interest to avert the destruction of the travel agency business and with it the opportunity for consumers to secure access to comparative price and schedule information from neutral sources that is essential to optimizing consumer choice and competitive process.

Accordingly, ASTA and Mr. Galloway respectfully request the Secretary of Transportation to find the reductions in travel agent commission rates from eight to five percent announced by the Respondent airlines to be an unfair method of competition in air transportation or the sale of air transportation, within the meaning of 49 USC 41712, and pursuant to such statute order the air carriers and foreign air carriers to cease and desist immediately from continuing such practices.

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October 25, 1999

CERTIFICATE OF SERVICE

I certify that I have this 25th day of October, 1999, served a copy of the above Complaint of the American Society of Travel Agents, Inc. and Joseph L. Galloway upon counsel for each of the Respondent air carriers and foreign air carriers identified in the caption of the Complaint and shown on the attached list.

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